SUPREME COURT, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1293

THE CITY OF BLACK JACK,
a Municipal Corporation,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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OPINIONS BELOW

The findings of fact and conclusions of law of the United States District Court for the Eastern District of Missouri are reported at 372 F. Supp. 319, and are reproduced at pages A-1—A-22 of the Appendix. The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 508 F.2d 1179, and is reproduced at pages 9-23—A-37 of the Appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on December 27, 1974 (A-23). A timely petition for rehearing was denied on January 20, 1975 (A-38). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Was the action of petitioner, a small suburban city located within St. Louis County, Missouri, in enacting a zoning ordinance limiting new residential construction to single-family dwellings, invalid as denying dwellings on the basis of race under Sections 3604(a) and 3617 of the Civil Rights Act of 1968 by reason of an alleged effect on low-income residents of another city, St. Louis, of whom a majority are black?

2. In deciding on the validity of the zoning ordinance did the court below err in requiring the showing of a "compelling governmental interest" rather than only a "rational basis" for the zoning ordinance where (a) the challenge was based, not on alleged unconstitutionality, but on conflict with federal statutes, and (b) there was not a sufficient prima facie showing to warrant application of the "compelling governmental interest" test even had the challenge been based on alleged unconstitutionality?[1]

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[1] In the event a writ of certiorari is granted, petitioners may also urge, as an additional ground for reversal, that the City is not a "person" within the meaning of Section 3613 of the Act under which the United States purports to bring the action. *Cf.* City of Kenosha v. Bruno, 412 U.S. 507 (1973).

STATUTES INVOLVED

The relevant portions of Title VIII (Fair Housing) of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601 *et seq.*, are set forth below:

Section 3604(a):

> "As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—
>
> "(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin."

Section 3617:

> "It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by sections 3603, 3604, 3605, or 3606 of this title. This section may be enforced by appropriate civil action."

STATEMENT

This proceeding was begun on June 14, 1971, when the United States filed a complaint alleging that petitioner City of Black Jack (the City) had denied persons housing on the basis of race, in violation of Section 3604(a), and had interfered with

the right to equal housing opportunity, in violation of Section 3617, by its adoption of a zoning ordinance which prohibited the construction of any new multiple-family dwellings.[2] Following denial of the City's motion to dismiss, trial was had, and on March 20, 1974 the District Court entered its findings of fact and conclusions of law, which may be summarized as follows:

The City of Black Jack was incorporated on August 6, 1970. It is located in St. Louis County, and encompasses 1700 acres of land. (A-2). Before the City was incorporated, about 500 acres were built upon, 15.2 acres in 321 apartment units, and 483.1 acres in 855 single-family dwelling units. The 15.2 acres of apartment units were included in 67 acres which had been zoned by St. Louis County, which then exercised municipal authority, for multiple use. (A-3). The average cost of houses was about $30,000, and the average income of the residents was about $15,000. The residents were over 99 per cent white. (A-11).

In 1969, the Inter Religious Center for Urban Affairs (ICUA), which had been formed to seek solutions to social and urban problems in the St. Louis area, concluded that there was a need for housing opportunities in St. Louis County for persons of low and moderate income then living in the City of St. Louis. After a search, ICUA selected an 11.9 acre site in what is now the City of Black Jack. (A-4). In March 1970, Park View Heights Corporation (PVH), a not-for-profit corporation which was to be the developer-mortgagor, applied to FHA for an initial development of 108 two-story townhouses to rent for between $118 and $157 per unit. (A-4, 5).

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[2] A similar complaint, filed on January 7, 1971, by private individuals, was dismissed by the District Court for lack of standing and absence of a justiciable controversy. That decision was reversed by the Court of Appeals. Park View Heights Corp. v. City of Black Jack, 467 F.2d 1208 (8th Cir. 1972), reversing 335 F. Supp. 899 (E.D. Mo. 1971). No trial has yet been had in that proceeding.

In February 1970, while this was occurring, a commercial developer applied to St. Louis County for a permit to build 600 homes (to be expanded to 1,000) on 161.8 acres in what is now the City of Black Jack. The plan for these houses (known as Summerhill), which were to be priced in the $16,000 range, involved rezoning the required minimum land per unit downward from 15,000 to 5,000 square feet. (A-5).

The proposed Summerhill development was vigorously, but unsuccessfully, opposed by Black Jack people; however, the development was never built. Flyers were distributed, and the Black Jack Improvement Association on March 10, 1970 met to consider opposition to Summerhill, to consider incorporation as a city, and to investigate what were then rumors of a federally-subsidized apartment complex. (A-6). When PVH became a matter of public knowledge, further meetings occurred, and when FHA issued a feasibility letter for the Park View Heights project on June 5, 1970, activity increased. (A-7). On June 26, 1970, petitions requesting incorporation were presented to the St. Louis County Council. The reasons given by the incorporators for the request were to establish Black Jack's own local government and to regulate the area's zoning. The City was incorporated on August 6, 1970. (A-7).

Due to a state court writ, municipal authority of the City was suspended until September 15, 1970. Shortly thereafter, the City's Zoning Commission issued notices of hearings on what became Ordinance 12, and on October 20, 1970 the ordinance was passed. (A-10). Two blacks on the 12-member commission joined in the unanimous vote. (A-10). The ordinance excluded any additional multi-family units, and made the 321 existing units non-conforming uses. (A-10). The chairman of the commission summarized its action as intended to preserve single-family use of land in the community, and as putting an "economic floor" under future residential construction. (A-10).

At the trial below, the zoning commissioners and other defense witnesses cited, among many others, three principal objections to apartments: that they would burden the roads and increase traffic, that they would add to overcrowding of the schools, and that they would decrease the values of adjacent single-family houses. (A-10). There was also testimony concerning racial discrimination sufficient to show that race was a consideration of at least a few of the people of Black Jack, and that one of the zoning commissioners was personally prejudiced. (A-11).

The City has a black population of 1 to 2 per cent. In St. Louis County the percentage of blacks was 4.8 in 1970 (up from 4.1 per cent in 1950); in St. Louis City the percentage in 1970 was 40.9 (up from 17.9 per cent in 1950). (A-11).

The concentration of blacks in St. Louis is accompanied by overcrowding or substandard housing—40 per cent of black families are so situated as compared with 14 per cent of white families. (A-12). So far as concerns income, 79 per cent of the blacks and 51 per cent of the whites in the St. Louis Standard Metropolitan Statistical Area (SMSA)[3] earned less than $10,000 per year, and 32 per cent of the black families and 29 per cent of the white families earn between $5,000 and $10,000 per year—the income range that would permit a family to live in the projected Park View Heights development. (A-12). It was stipulated that the residential racial composition in housing in the City of St. Louis described above was in large measure the result of deliberate racial discrimination prior to 1968 in the housing market by the private real estate industry and agencies of government. (A-13).

On the basis of the findings summarized above, the District Court concluded that Ordinance 12 was valid, and dismissed

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[3] The St. Louis SMSA consists, in addition to the City of St. Louis and St. Louis County, of three other counties in Missouri and three in Illinois. The City of Black Jack is one of 96 separate municipalities in St. Louis County.

the action. (A-22). The court determined that its review was limited to whether the ordinance is unreasonable, arbitrary or without a rational basis. (A-18). It rejected the government's contention that the showing of any racial sentiment whatever established that the purpose of the ordinance was to exclude PVH on account of race, and further concluded that the racial statements attributed to a very few Black Jack residents did not support a charge of racial motivation, purpose or intent in enacting the ordinance. (A-18). The multiple reasons advanced for opposition to apartments—the character of the community, road congestion, school impaction, property devaluation and opposition to transient apartment dwellers—the court concluded supply a rational basis for the action of the City. (A-19).

The court also rejected the contention that the effect of the ordinance was to perpetuate racial discrimintion in housing. (A-20-22). Noting that the PVH project will serve people with an income range of from $5,000 to $10,000, and that the percentage of blacks and whites in that income range in the SMSA is approximately the same (32 and 29 per cent, respectively), the court concluded that the ordinance would not be racially discriminatory. (A-12, 22). Finally, the court rejected the contention that because there would be a higher percentage of blacks in PVH than in the remainder of the City, excluding PVH is preventing integration, noting that such an argument would necessarily exempt all multi-family housing from local zoning controls in the area surrounding any disproportionate city. (A-21).

On appeal, the Court of Appeals reversed. It held, first, that the burden of proof on the plaintiff in a case such as this is governed by the concept of the prima facie case, which can be established by proof that the ordinance has a discriminatory effect. (A-30). "Effect, not motivation, is the touchstone." (A-31). Second, it held that once a prima facie case had been established, then the burden shifts to the defendant to demonstrate that the

ordinance was necessary to promote a "compelling governmental interest." (A-31 and n.4).

Applying these holdings, the court concluded that the District Court erred in holding that the ordinance had no discriminatory effect because that court "failed to take into account either the 'ultimate effect' or the 'historical context' of the City's action." (A-32). The "ultimate effect," the court stated, was to foreclose 85 per cent of the blacks in the metropolitan area from obtaining housing in the City—"but one more factor confining blacks to low-income housing in the center city." (A-33).

Having thus determined that a prima facie case of discrimination had been made, the court examined the governmental interests asserted to justify the ordinance and concluded that none of them was adequately supported in the record. (A-36).

A timely petition for rehearing was denied. (A-38).

REASONS FOR GRANTING THE WRIT

I

The Court Below Has Decided an Important Question of Federal Law That Has Not Been But Should Be Settled by This Court.

There can be no doubt as to the importance of the issue presented in this case. Low-density zoning in suburban cities and villages designed to maintain their suburban characteristics—minimum lot sizes, minimum floor space requirements, exclusion of multiple-family dwellings—are the common pattern around large cities. See Berger, *Land Ownership and Use* (1968), pp. 686-687. Most large cities also contain a concentration of racial minorities with low incomes. The situation in the St. Louis metropolitan area is duplicated, in other words, throughout the United States. The decision below thus raises serious questions as to the validity of literally thousands of ordinances which have been enacted during the last fifty years to regulate suburban residential development.

The full significance of the decision below is emphasized by noting what is not involved. The challenged zoning ordinance did not expressly segregate areas for one race, as in *Buchanan v. Warley*, 245 U.S. 60 (1917); the challenged ordinance is, on its face, entirely neutral in its application. It was not motivated by, nor intended to effect, racial discrimination. The District Court so found; the court below deemed motive and intent irrelevant. The ordinance does not conflict with Missouri zoning law; single purpose zoning for individual detached houses is entirely permissible. *McDermott v. Village of Calverton Park*, 454 S.W.2d 577 (Mo. 1970); *Bosch v. Village of Uplands Park*, 494 S.W.2d 339 (Mo. 1973).

Furthermore, since *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), this Court has recognized not only the power but also the propriety of zoning ordinances enacted by cities and villages designed to maintain the quality of community life desired by those who live there. The line of decisions through *Berman v. Parker*, 348 U.S. 26 (1954), down to the decision at the last term in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), has served to confirm and strengthen that municipal power. As it was summed up in *Boraas*:

> "A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within *Berman v. Parker, supra.* The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." 416 U.S. at 9.

It can fairly be said that in enacting zoning laws, just as in determining educational policy, "[e]ach locality is free to tailor local programs to local needs." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 49-50 (1973).

Notwithstanding the zoning decisions of this Court culminating with *Boraas* and the absence of any showing of racially discriminatory intent, the court below held the City's facially neutral ordinance to be invalid under Sections 3604(a) and 3617. The goal recognized in *Boraas* was held to be an impermissible one for the residents of the City of Black Jack not because they did not regard that goal as desirable—indeed, that is the purpose of the challenged ordinance—but because of the alleged effect of this aspiration on people living outside the City in the St. Louis metropolitan area and particularly in St. Louis itself. Reliance on such extraterritorial considerations appears

to be contrary to the position which this Court has previously taken in comparable circumstances. *Cf. San Antonio Independent School District v. Rodriguez, supra; Milliken v. Bradley,* 418 U.S. 717 (1974).

What is more, the court's determination that the operation of the ordinance would have an impermissible extraterritorial effect was based on nothing more than statistics of race and income—statistics which are susceptible to widely varying interpretations. According to the court below, the "ultimate effect of the ordinance was to foreclose 85 percent of the blacks living in the metropolitan area from obtaining housing in Black Jack." (A-32). Even ignoring the 321 apartment units already in Black Jack, and accepting the accuracy of this statement,[4] it does not, however, follow that black families are foreclosed from obtaining housing in apartments elsewhere in the metropolitan area. The 1700 acres comprising the City is but a small part of the St. Louis metropolitan area, which extends into two states. (See footnote 3, p. 6, supra). Nothing in the record suggests, in other words, that families—black or white—which could afford only low-income apartments would suffer an "absolute deprivation"[5] of such accommodations if the City's ordinance were sustained.

Even more importantly, however, the court's statement as to the effect of the challenged ordinance cannot be read to mean that blacks alone are foreclosed from securing housing in the City. At the income level which would make it feasible for a family to rent an apartment in the proposed project

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[4] The 85 percent figure does not appear in the findings of the District Court. That court found that 79 percent of the black and 51 percent of the white families in the metropolitan area had incomes of less than $10,000 per year. (A-12). If the 85 percent is an extrapolation of the findings of 79 percent, the percentage of white families in the metropolitan area who would similarly be foreclosed would be between 55 and 60 percent.

[5] *See* San Antonio Independent School District v. Rodriguez, *supra,* at 20-22.

which led to this action, the percentages of black and white families in the metropolitan area are substantially the same—29 and 32 percent respectively. Plainly, the mere fact that the challenged ordinance imposes—as doubtless does virtually every other zoning ordinance—greater restraints on individuals with smaller incomes, whatever their race, than on those with larger ones does not make it racially discriminatory.[6] Yet, the decision at issue here is based on nothing more. As a consequence, that decision, as framed by the court below, does nothing less than draw into question the continuing validity of this Court's long line of decisions recognizing the power of local communities to enact reasonable zoning ordinances reflecting the aspiration of their residents concerning the planning and development of the community. And, the decision does so without even suggesting, much less finding, that the statutory provisions upon which it is based were intended by Congress to have such a far-reaching effect.

II

The Decision Below Is in Apparent Conflict With Decisions of This Court.

The only justification provided by the court below for holding that the challenged ordinance could not be sustained unless a "compelling governmental interest" were shown to have underlaid its enactment was that such a showing has been required by this Court in cases "involving . . . challenges [under the Equal Protection Clause] to statutes or ordinances creating 'suspect classifications,' *see In re Griffiths*, 413 U.S. 717 (1973); *Korematsu v. United States*, 323 U.S. 214 (1944),

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[6] *Accord, Ybarra v. City of Town of Los Altos Hills*, 503 F.2d 250, 253 (9th Cir. 1974); *English v. Town of Huntington*, 448 F. 2d 319, 324 (2nd Cir. 1971). See also discussion at pp. 15-17, *infra*.

or impinging on 'fundamental rights[, s]ee *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Skinner v. Oklahoma*, 316 U.S. 535 (1942)'." (A-31, n. 4). The court offered no reason or precedent to support the extension of the "compelling governmental interest" test from the constitutional realm—to which it heretofore has been restricted—to the statutory issue presented by this case. As a consequence, we believe that this unprecedented action by the court below cannot be sustained. Yet, even if this Court's equal protection decisions are to be considered relevant here, the decision of the court below appears to be inconsistent with the prior decisions of this Court.

There is no fundamental interest at stake in this case. Only last term in *Boraas, supra*, this Court, in rejecting an equal protection attack on a zoning ordinance much like the one at issue here, stated that the ordinance "involves no fundamental right guaranteed by the Constitution." (416 U.S. at 7). This Court continued:

> "We deal [here] with economic and social legislation where legislators have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be 'reasonable, not arbitrary' . . . and bears 'a rational relationship to a [permissible] state objective' " (416 U.S. at 8).

And in *Lindsey v. Normet*, 405 U.S. 56 (1972), this Court similarly stated:

> "We are unable to perceive in that document [the Constitution] any constitutional guarantee of access to dwellings of a particular quality . . ." (405 U.S. at 74).

Nor, under the prior decisions of this Court, did the court below have any basis for the finding of a "suspect classification" in the form of a prima facie showing of racial discrimination. This Court's decisions in *James v. Valtierra*, 402 U.S. 137

(1971), and *Palmer v. Thompson*, 403 U.S. 217 (1971), make clear—as one court recently observed—that "a seemingly neutral policy which affects the majority as well as a minority, but which has a greater practical impact or places a greater burden on the minority, is not thereby invalid."[7] *Citizens Committee for Faraday Wood v. Lindsay*, 362 F. Supp. 651, 658 (S.D.N.Y. 1973). Under *Palmer* and *Valtierra*, "it appears that in housing, for a racially discriminatory effect to be found, there must be some showing that a policy or activity which has a racially discriminatory effect results from a prior pattern of discrimination or that such policies affect only racial minorities." *Id.* at 659. As has been seen, there clearly was no showing in this case of either a prior pattern of discrimination or of effect only on a racial minority. Thus, the court below lacked the requisite basis for a finding that a prima facie case of racial discrimination had been made here and the existence of a suspect classification thereby established.

In view of the absence of either a fundamental interest or a suspect classification, the ruling of the court below that the challenged ordinance could be sustained only by the showing of a "compelling governmental interest" appears to be in direct conflict with this Court's equal protection decisions not only in *Boraas, Normet, Valtierra* and *Palmer* but also in *Griffiths, Korematsu, Shapiro* and *Skinner*, the very decisions upon which the court below relied.

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[7] In *Valtierra*, this Court, in rejecting the view that a challenged state constitutional article requiring local referenda for low-cost housing "rests on 'distinction based on race,' " said: "The Article requires referendum approval for any low-rent public housing project, not only for projects which will be occupied by a racial minority." 402 U.S. at 141. The zoning ordinance at issue here cannot be said to be any less "color-blind" in its effect. And, this Court likewise emphasized that blacks and whites alike suffered the consequences of the closing of the municipal swimming pool sustained under the "rational basis" test in *Palmer*, notwithstanding the apparently greater practical impact of the closing on the racial minority. 403 U.S. at 219-20.

III

The Decision Is in Conflict With the Decisions in Other Circuits.

The decision below is in conflict with the decision of the Court of Appeals for the Ninth Circuit in *Ybarra v. City of Town of Los Altos Hills*, 503 F.2d 250 (1974), and the decision of the Court of Appeals for the Sixth Circuit in *Mahaley v. Cuyahoga Metropolitan Housing Authority*, 500 F.2d 1087 (6th Cir. 1974), *cert. denied*, 95 S.Ct. 781 (1/14/75). This conflict on an important question of federal law should be resolved by the Court.

In *Ybarra*, the plaintiffs challenged a zoning ordinance which limited construction to single-family dwellings with a minimum one-acre lot size as invalid under both the Equal Protection Clause and the National Housing Act as discriminating against them on the basis of "ethnic background and wealth." In affirming the trial court's dismissal of the action, the Ninth Circuit acknowledged the findings of the trial court that there was a "high correlation" in the Town of Los Altos Hills between those who were poor and those who were Mexican-Americans, but it then also pointed out that the ordinance did not prevent Mexican-Americans of sufficient means from living in Los Altos Hills. Against this background, the Court of Appeals held—as had the trial court—that "discrimination against the poor does not become discrimination against an ethnic minority merely because there is a statistical correlation between poverty and ethnic background." 503 F.2d at 253.[8]

No less than was true of the ordinance in *Ybarra*, the ordinance at issue here does not prevent persons of sufficient means

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[8] The court found no violation of the Equal Protection Clause by reason of discrimination on the basis of wealth because plaintiffs had not established an absence of "meaningful opportunity" to obtain low-cost housing elsewhere. 503 F.2d at 254.

from residing in the City without regard to their race or ethnic origin. It is only because the court below interpreted statistical evidence of income disparities to mean that more blacks than whites would be unable to live in the City as a result of the challenged ordinance that it was held to be racially discriminatory. This holding is precisely contrary to the decision in *Ybarra*.[9]

Mahaley was brought to compel five suburbs of Cleveland, Ohio to enter into cooperative agreements necessary under federal law to allow the construction of public housing within their limits. Plaintiffs, all nonresidents of the five suburbs, claimed that the suburbs' failure to enter into such agreements violated their constitutional rights. The trial court agreed with the plaintiffs on the basis that the suburbs' failure had had the "clear effect" of racial discrimination by excluding low income persons, including blacks, from the suburbs and by perpetuating the exising housing pattern for such persons throughout the metropolitan Cleveland area. Reversing the trial court, the Sixth Circuit held:

> "In the present case, the failure of the suburbs to provide low-cost housing affected alike both low-income blacks and whites. There may have been a greater impact on the blacks, but that, under *Palmer* [*v. Thompson*, 403 U.S. 217 (1971)], is not sufficient to establish a constitutional violation." (500 F.2d at 1087).

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[9] The decision below and that of the Ninth Circuit in *Ybarra* are also in conflict on the showing which a plaintiff must make before it becomes appropriate to apply the "compelling governmental interest" rather than the "rational basis" test in determining the validity of a zoning ordinance which, on its face, does nothing more than restrict access to housing on the basis of personal wealth. The Ninth Circuit held that application of the "compelling governmental interest" test was inapplicable where no showing had been made that low-cost housing was not available elsewhere in the relevant area to those affected by the challenged ordinance. 503 F.2d at 254. *See also* San Antonio Independent School District v. Rodriguez, *supra*, at 20. Any such showing is likewise lacking here. See pp. 10 and 11, *supra*.

The decision below conflicts with the holding in *Mahaley* for precisely the same reason that it conflicts with the holding in *Ybarra*: the mere showing that particular legislation may have a statistically greater effect on blacks than on whites is not sufficient to establish the existence of racial discrimination.

It is true that both *Ybarra* and *Mahaley* involved claims of racial discrimination under the Equal Protection Clause rather than under Sections 3604(a) and 3617. Surely, however, the test of discrimination under those statutory provisions is no stricter than it is under the Equal Protection Clause.[10] Indeed, as has already been discussed, the court below specifically relied on precedents of this Court under the Equal Protection Clause in deciding the statutory issue in this case. Under these circumstances, it would seem impossible to reconcile the decision below with the holdings in *Ybarra* and *Mahaley*. Yet, no reference whatsoever was made by the court below to the decision in *Ybarra*, and the only reference made to *Mahaley* was to the decision of the trial court which had, of course, been reversed.

CONCLUSION

With increasing frequency, the federal courts have been presented with issues involving the validity of zoning ordinances under the Equal Protection Clause, Section 1983 of the Revised Code, and, as here, under the Fair Housing Title of the Civil Rights Act of 1968.[11] As is apparent from what has been

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[10] At no point in this litigation has the Respondent even suggested that Sections 3604(a) and 3617 call for the application of a stricter test of racial discrimination than does the Equal Protection Clause. And, certainly the court below never hinted at, much less adopted, such a view.

[11] See, *e.g.*, in addition to the *Ybarra* and *Mahaley* cases, Williams v. Matthews Co., 499 F.2d 819 (8th Cir. 1974); Southern Alameda Spanish Speaking Organization v. City of Union City, 424 F.2d 291 (9th Cir. 1970); Kennedy Park Homes v. City of Lacka-

said above, the course of decisions has not been uniform. In the present case, moreover, principles established by this Court appear to have been overlooked or misunderstood, and a result reached which opens to challenge a vast array of zoning ordinances the validity of which has not heretofore been doubted. A review of the decision below should therefore be granted.

Respectfully submitted,

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wanna, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); Ranjel v. City of Lansing, 417 F.2d 321 (6th Cir. 1969); Joseph Skillken & Co. v. City of Toledo, 380 F. Supp. 228 (N.D. Ohio, 1974); Sisters of Providence of St. Mary of the Woods v. City of Evanston, 335 F. Supp. 396 (N.D. Ill. 1971).

APPENDIX

372 F. Supp. 319

United States District Court
Eastern District of Missouri
Eastern Division

United States of America,
Plaintiff,
vs.
City of Black Jack, Missouri, a Municipal Corporation,
Defendant.
No. 71 C 372 (1).

JUDGMENT

Findings of fact and conclusions of law filed this date are hereby incorporated in and made a part of this judgment.

It Is Hereby Ordered, Adjudged and Decreed that the organization of the City of Black Jack, Missouri, and the enactment of the zoning ordinance prohibiting the building of apartments is a lawful and proper exercise of the police power of a municipality by its legislative body, the city council.

It Is Further Ordered, Adjudged, and Decreed that a judgment is rendered in favor of the City of Black Jack, Missouri, and against the plaintiff, the United States of America, and this cause is dismissed with prejudice at the cost of the plaintiff.

Dated this 20th day of March, 1974.

/s/ JAMES H. MEREDITH
United States District Judge

United States District Court
Eastern District of Missouri
Eastern Division

United States of America,
Plaintiff,
vs.
City of Black Jack, Missouri, a Municipal Corporation,
Defendant.
No. 71 C 372 (1).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In this action the United States has alleged that the City of Black Jack, Missouri, has engaged in racially discriminatory housing practices in violation of the Fair Housing Act of 1968, 42 U.S.C. 3601, et seq., by exercising its zoning powers to exclude Park View Heights, a federally-subsidized housing development for low to moderate income persons. The United States claims that racial discrimination was a significant element in the defendant's purpose. The Court makes the following findings of fact and conclusions of law.

Findings of Fact

1. In 1970 the Black Jack area was unincorporated, and all municipal type of authority was exercised by St. Louis County through its Planning Commission and other departments of the St. Louis County Council.

2. Of the 1,700 acres which were later to become the City, 498.3 acres were built upon and in use, and 1,218 acres were

vacant. The vacant acres included undeveloped platted tracts in existing subdivisions, flood plain, and unsubdivided land. Of the land on which buildings were in existence, 15.2 acres were built up with 321 apartments, and 855 single-family dwelling units were on the balance of the developed acreage. The 15.2 acres of apartments were included in a total of 67 acres which had been zoned multiple by the County's 1965 Master Plan. The number of apartments built on the 15.2 acres comprised 27% of all the dwelling units, and 40% of the dwelling units built in the previous fifteen years, in what was later to be the city. If the entire 67 acres, which the County had zoned for multiple dwelling purposes, had been developed for apartments, with the same density per acre as on the 15.2 acres already built up, it would have resulted in 1,412 apartment units. Added to the 3,723 single-family residences that could be built on the remaining city acreage, an estimated density of population per acre of 9.45 would result. The County average per (built up) acre was 7.2. The estimated number of occupants of apartments was taken to be 2.5, while the number of occupants of single-family residences was from 3.5 to 3.75. The "Flood Plain" zone, adjacent to Cold Water Creek, is required by the periodic backing up of the Missouri River, making some of the land useless, except for parks and like uses.

3. The average cost of homes in what was to be the City of Black Jack was approximately $30,000.

4. The average income of Black Jack families is approximately $15,000 annually.

5. In 1967, the Inter Religious Center for Urban Affairs (ICUA) was organized by a group of religious institutions to seek constructive solutions to social and urban problems in the St. Louis area. In the fall of 1969, after several ventures in which ICUA had assisted groups seeking to improve hous-

ing in all-black areas, Jack Quigley and Paul Mittelstadt, who organized ICUA's housing program, determined that there was a need to create for persons of low and moderate income living in the ghetto areas of St. Louis City alternative housing opportunities in the predominantly white suburbs of St. Louis County. The proposed Park View Heights (PVH) development, which is the subject of this litigation, was designed for this purpose.

6. In late 1969, ICUA began an analysis of available land in order to select the most appropriate site for the proposed development. Mr. Mittelstadt viewed and considered a number of parcels of land in North County, including one immediately adjacent to St. Mark's Methodist Church (St. Mark's), one of the co-sponsors of the project with the United Metro Ministry, and favored by board members of that church, but which turned out to have an inappropriate zoning classification. Eventually, the ICUA representatives selected an 11.9 acre site at the intersection of Old Jamestown and Parker Roads, in a part of St. Louis County which was then unincorporated, but which is now within limits of the City of Black Jack.

7. On December 23, 1969, the ICUA paid $5,000 in earnest money for an option to the property at a price of $240,000 or $20,000 per acre.

8. Title to the land was to vest in the Park View Heights Corporation, a not-for-profit corporation which was created by the sponsors to become the developer-mortgagor of the Park View Heights development. A Board of Directors, which included six black members and six white members, was elected by the Boards of Directors of St. Mark's and Metro Ministry. Subsequently, Methodist Bishop Eugene Frank also became a sponsor and selected three additional members to the Board.

9. On March 6, 1970, the Park View Heights sponsors filed a preliminary application with FHA for initial approval of a

proposed §236 development at the corner of Parker Road and Old Jamestown Road. According to the Form 2013 submitted by the sponsors, the initial development was to include 108 two-story townhouse units with a wood frame and brick construction. The breakdown of the units by size and rent (including utilities) was as follows:

	No. of Units	Basic Rent
1-bedroom	8	$118
2-bedroom	54	135
3-bedroom	42	146
4-bedroom	4	157

10. The architectural firm of Anselevicius and Rupe and the construction firm of Monsey-Feagher Engineers and Constructors, Ltd., were selected to design and build the development.

11. While these developments were occurring, a controversial housing development (Summerhill) was creating lively discussion in the Black Jack area. Summerhill was a request to St. Louis County by the Alfred H. Mayer Company on February 10, 1970, for a Planned Environmental Unit Special Procedure Permit for 600 homes (to be expanded to 1,000) to be built on 161.8 acres fronting on Old Jamestown Road, involving rezoning downward of the acreage from 15,000 to approximately 5,000 square feet per lot. It was vigorously, but unsuccessfully, opposed by Black Jack people; however, the project was never built. Summerhill was planned as single-family residential, but in the lower income spectrum, involving 600 to 1,000 dwelling units. In the price range as advertised ($16,000), the people of the area felt it would have devalued present property values and increased population density disproportionately to the rest of the community.

12. About 4,500 "handouts" entitled "Are you Aware?" were mailed to the citizens of the area in opposition to Summerhill.

13. Meetings of the Black Jack Improvement Association (BJIA) were stimulated by the pendency in the St. Louis County Planning Commission and the St. Louis County Council of the petition for "Summerhill". At a meeting of the BJIA on March 10, 1970, three things were considered: (1) opposition to Summerhill; (2) incorporation as a City of Black Jack to "give a handle on local government"; and (3) investigation of a rumored, unnamed federally-subsidized apartment complex (Park View Heights).

14. In late March or early April 1970, the proposal to build an FHA-236 development in Black Jack became a matter of public knowledge. Opposition to the development, organized and led by the BJIA, Spanish Lake Improvement Association (SLIA), and County Councilman Milton Bischof, developed almost immediately. A pamphlet was sent to area residents by the BJIA that was based on partially incorrect information and announced an April 8th meeting, which was held at a school in neighboring Spanish Lake. Residents seeking to learn more about Park View Heights received some inconsistent reports in the spring of 1970 from the sponsors, from public officials, and from adversaries of the development about the nature of the development and the income level of the group to be served. Some of these inconsistencies were cleared away before the zoning ordinance was passed. In recognition of the misapprehensions and opposition on the part of some area residents, representatives of the sponsors accepted invitations to speak at a number of community meetings about the proposed housing development. Representatives of the architectural firm attended some of the meetings and showed slides depicting what the project would look like. A detailed letter explaining PVH was also prepared by the sponsors and mailed to thousands of area residents in an effort to correct any misinformation about the development. Nevertheless, between misinformation and not knowing who to believe, confusion, distortions, and distrust of the nature of Park View Heights continued. Incorporation had

come up often before in Black Jack when annexation was threatened or when other nearby areas incorporated. There was also a dissatisfaction in the area with St. Louis County government, and a history of opposition to apartments, and these feelings were heightened by proposals such as Summerhill and Park View Heights.

15. The sponsors filed their application for a feasibility letter which was issued on June 5, 1970. As stated in *Park View Heights Corp. v. City of Black Jack*, 467 F.2d 1208, at 1211 (8th Cir. 1972):

> "Upon learning of the 'feasibility letter,' area residents began a drive to incorporate the area including the site of the proposed Park View Heights apartments. On June 26, 1970, the Citizens for the Incorporation of Black Jack presented two petitions requesting incorporation with 1,425 signatures to the St. Louis County Council. Between June 26, 1970, and August 6, 1970, the St. Louis County Department of Planning reported to the St. Louis County Council that they 'strongly opposed the act of incorporation on fiscal, planning, and legal grounds.' Despite this opposition, the St. Louis County Council incorporated the City of Black Jack, Missouri, on August 6, 1970."

16. The reasons for incorporation given by the incorporators were to establish Black Jack's own independent local government and to regulate Black Jack's own zoning. Dr. Schuchardt, chairman of the zoning commission and a community leader, gave the reasons as follows:

1. Desire for local government.
2. Feeling County Government had ignored the people's wishes on Summerhill.
3. In this case the Federal Government also ignored the people's wishes on Park View Heights (but the incor-

poration effort was going on before that, so it was really dissatisfaction with the county over a period of time).

4. Problems with the police.
5. The county's plan to reroute Old Halls Ferry Road.
6. Zoning.

17. The incorporators also submitted a list of officers, pursuant to Missouri statute, suggesting the appointment of the officers of the newly incorporated city of Black Jack until the next election, which list contained the names of eight suggested councilmen.

18. However, the County Council appointed only four of the eight submitted by the incorporators, adding four of the County Council's own selection to make the total of eight councilmen requested. Those appointed by the County Council from its own selection were:

1. Harold Evangelista
2. Alden Williams
3. Herb Bangert
4. G. Joe Schulte

Those appointed by the County Council from the eight suggested by the incorporators were:

5. Joan (Mrs. William) Kessler
6. Albert N. Schroeder
7. James Connolley
8. Mrs. Noah Epley

19. As stated in *Park View Heights Corp. v. City of Black Jack*, supra, at 1211:

"On August 13, 1970, Park View Heights Corporation was formed by St. Mark's, Metro Ministry, and Bishop Eugene M. Frank, the Office of the Missouri Bishop of the United Methodist Church, since July 1970, a joint sponsor of the Park View apartments. On September 8, 1970, Park View Heights Corporation assumed title to the proposed site as an assignee of ICUA.

"Between the date of the municipal incorporation and September 15, 1970, the municipal authority of the City of Black Jack was suspended by a Writ of Prohibition issued by a state court. Within six days after the writ was dissolved, the city Zoning Commission issued notices of hearings on a zoning ordinance which would effectively prevent the construction of new multi-family dwelling units within the City of Black Jack."

20. The zoning commission of Black Jack was made up of two women, two blacks, some engineers, and a businessman, among others, being twelve in number: Henke, Schmiedler, Hutton, Thomas, Sewing, Hunter, Hoyt, Volentine, Bresler, Begeman, Ulrich, and Schuchardt. Schuchardt was elected by the commission as its chairman after its appointment.

21. When the Council appointed the zoning commission, all of the councilmen submitted names of likely prospects and then the eight councilmen formed teams of two to interview the persons whose names had been submitted. One member of a two-man team was a councilman who had been selected by the County Council against the suggestion of the incorporation committee, while the other member was a councilman who had been selected by the County Council from among the names the incorporation committee submitted to them.

22. The zoning commission had six meetings and two public hearings, and submitted a preliminary report on September 23, 1970, to the public, and a final report with a draft of what

was to be City Ordinance No. 12, on September 29, 1970. The meetings lasted three hours on the average, and opposition to the proposed zoning ordinance was expressed by some people, including Mr. Vorhof of Whitney Chase and Mr. Williams of Park View Heights Corporation.

23. The zoning commission was unanimous in its vote in favor of the zoning ordinance, which excluded all new multiple-family dwellings, and made present ones non-conforming uses. The Zoning Ordinance No. 12 was passed on October 20, 1970. Dr. Schuchardt summarized the principal characteristics of the recommendations of the zoning commission and the zoning ordinance submitted with it as intended to preserve the single-family use of land in the community. He understood that poor people would be less able to afford a home in Black Jack. He understood that the zoning commission was putting an "economic floor" under construction of future residences in Black Jack. It should be noted that the two black men on the zoning commission also voted in favor of this ordinance, because they opposed apartments.

24. When examined by plaintiff with respect to the underlying reasons for their opposition to apartments and to Park View Heights, substantially all of the zoning commissioners and other defense witnesses cited one or more of the following three objections to apartments:

a. They would burden the roads, increase traffic, or both;

b. They would add to overcrowding of the schools; and

c. They would devalue adjacent single-family houses.

There were some other reasons advanced, but these were the most often repeated. Testimony and evidence was presented attempting to refute these reasons or to show them to be invalid.

There was also testimony presented concerning racial discrimination. Much of the testimony was irrelevant as to the City of Black Jack and its zoning ordinance. It was sufficient, however, to show that race was a consideration of at least a few of the people in Black Jack, and one of the zoning commissioners was personally prejudiced. A former mayor testified that in his opinion race was one factor, albeit "very insignificant" and only in some people.

25. Statistical information submitted shows that at the relevant time the area which is now the City of Black Jack was virtually all white, with a black population of between 1% and 2%. The area of St. Louis County north of Interstate Highway 270, which includes Black Jack, is approximately 99% white. In 1970, the Hazelwood School District, of which Black Jack is a part, had a total of 24,256 students, of whom only 250, or almost exactly 1% were black.

26. The virtually all-white character of Black Jack was in marked contrast to the racial composition of other parts of the St. Louis area. In 1970, the pupil population of the City of St. Louis School District was 65.6% black. The few blacks in north St. Louis County tended to live in racial pockets. In 1970, the Kinloch School District, which is only two miles from the nearest boundary of the Hazelwood School District, had 1,245 students, all of whom were black.

27. The percentage of blacks in St. Louis County has increased only slightly overall from 4.1% in 1950 to 4.8% in 1970. During the same period, the percentage of blacks in the City of St. Louis more than doubled from 17.9% to 40.9%.

28. Between 1950 and 1970, the population of the city declined from 856,796 to 622,236, a decrease of 27%, while the population of the county more than doubled from 406,349 to 951,353. From 1960 to 1970, there were approximately 102,298 new housing starts in the county, and 15,348 in the

city, a ratio of almost 7 to 1. During the same period, the city had a net decrease of 24,548 housing units, while the county had a net increase of 84,169. With regard to employment opportunity, the following table reflects the number of persons employed in the city and county in 1950, 1960, and 1970:

	St. Louis City	St. Louis County
1950	366,524	156,526
1960	294,000	263,200
1970	231,765	384,409
Increase or Loss 1950-1970	−134,759	+227,883

29. The concentration of blacks in the city and in pockets in the county is accompanied by the confinement of a disproportionate number of them in overcrowded or substandard accommodations. The 1970 census reveals that in St. Louis city and county approximately 40% of the black families, as compared with 14% of the white families, lived in overcrowded units. However, the relevancy of these statistics is questionable since Park View Heights will only accommodate low and moderate income families and many of these will not be helped.

Other statistics submitted showed 79% blacks and 51% whites earned less than $10,000 in the St. Louis metropolitan area [which for these purposes is the standard metropolitan statistical area (SMSA), including St. Louis City and County, St. Charles County, Jefferson County, and Franklin County, in Missouri, and Madison and St. Clair Counties in Illinois].

In the SMSA, 32% of the black families and 29% of the white families make between $5,000 to $10,000, which, according to defendant's statistics, makes racial composition of this group 85% white and 15% black, very close to the 86%

white and 14% black composition of the SMSA. Fifty-eight percent of the blacks in the above category $5,000 to $10,000 rent, while 39% of the whites in this category rent their homes.

This Court has liberally cited from these presented statistics, although many are irrelevant to this case, as will be explained later.

30. In its pretrial brief and during discovery, the United States proposed to introduce extensive evidence to show that the residential racial composition in housing described in the foregoing findings was in large measure the result of deliberate racial discrimination in the housing market by the real estate industry and by agencies of the federal, state, and local governments. Early in the trial, the parties stipulated that this was true, thereby obviating the necessity for extensive proof on this issue.

The income range relevant to this lawsuit, however, is that of $5,528 to $10,143, as set out in this Court's order of February 23, 1973, since this is the income range for Park View Heights, with a $300 per child and 5% social security deduction allowed.

31. The City of Black Jack has, on the face of the evidence presented, been a financial success in terms of service, taxation, and fiscal affairs.

32. HUD Secretary Romney had, in May 1970, unsuccessfully asked Congress to exclude federally-assisted housing from the operation of local zoning ordinances by letter to the Honorable Wright Patman, Representative, dated May 27, 1970, transmitting draft of proposed legislation entitled "Local Exclusion of Federally Assisted Housing". To date, Congress has not seen fit to grant HUD an exemption from local zoning ordinances as would have been granted by this proposed legislation.

33. The present action was instituted in June 1971, the Government claiming that the zoning ordinance of the City of Black

Jack had the effect of making desegregation much more difficult, and violated the Fair Housing Act of 1968, 42 U.S.C. 3601, et seq.

Conclusions of Law

1. This Court has general jurisdiction of this action under 28 U.S.C. 1345 and 2201 and 42 U.S.C. 3613, and has personal jurisdiction over the defendant.

2. In this case on March 30, 1972, this Court, in denying defendant's motion to dismiss this action and several additional motions, held, among other things:

a. That the complaint properly alleged racial discrimination, as distinguished from economic discrimination, even though Black Jack's Zoning Ordinance excluded all apartments and made no reference to race and even though there were no existing apartments from which blacks were alleged to have been excluded;

b. That the City of Black Jack is amenable to suit under 42 U.S.C. 3613; and

c. That there was no reason for this Court to abstain from taking jurisdiction.

In *Park View Heights v. City of Black Jack*, 335 F.Supp. 899 (E.D.Mo. 1971), the companion case to this action, the Court dismissed most of the allegations of the complaint on the grounds that the controversy was not ripe for adjudication, because plaintiffs had not asked for a building permit, and because several plaintiffs lacked standing. In *Park View Heights v. City of Black Jack*, 467 F.2d 1208 (8th Cir. 1972), the Court of Appeals reversed, holding that the controversy was ripe for adjudication. The Court of Appeals held that Black Jack's zoning ordinance

forbids all apartments, including Park View Heights, and that "it would be futile to require the plaintiffs to proceed further at the local level." The Court of Appeals further held that by alleging a statistical pattern of racial discrimination almost identical to the proof adduced by the United States in this case, the individual plaintiffs

> ". . . have presented a strong case for consideration at this time. They allege that they are subject to the serious consequences of segregation in housing and education as well as the economic consequences of decreasing access to jobs due to their inability to escape from the inner city." 467 F.2d 1216.

Accordingly, this Court concludes that any argument by defendant that Park View Heights did not exhaust its remedies is foreclosed by the judgment of the Court of Appeals in *Park View Heights v. City of Black Jack*, supra.

3. The Congressional intent in enacting Title VIII of the Civil Rights Act of 1968 is stated in 42 U.S.C. 3601 as follows:

> "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."

4. In addition to prohibiting discriminatory refusals to rent or to negotiate rental, 42 U.S.C. 3604(a) also makes it unlawful to "otherwise make unavailable" a dwelling, or to "deny" a dwelling, on account of race. The foregoing phraseology appears to be as broad as Congress could have made it. *United States v. City of Parma, Ohio*, C-73-439, Battisti, C.J. (Sept. 5, 1973). "Dwelling" is defined in 42 U.S.C. 3602(b) as including "any vacant land which is offered for sale or lease for the construction or location thereon" of residential property. Accordingly, where a municipality exercises its zoning powers in a racially discriminatory manner and thereby excludes housing which provides rental opportunities for significant numbers of

non-white persons, such conduct constitutes a violation of 42 U.S.C. 3604(a). *Park View Heights v. City of Black Jack*, supra; *Kennedy Park Homes v. City of Lackawanna*, 318 F.Supp. 669, 694 (W.D. N.Y. 1970), aff'd 436 F.2d 108 (2d Cir. 1970), cert. den. 401 U.S. 1010 (1971).

5. The city has moved once again to dismiss this action on the grounds that the city is not a "person" that can be sued under 42 U.S.C. 3613, and citing *Monroe v. Pape*, 365 U.S. 167 (1961), and *City of Kenosha v. Bruno*, 412 U.S. 507 (1973). It is true that the cited cases hold that a city is not a person within the definition of 42 U.S.C. 1983, and cannot, thus, be sued under that statute, either in law or equity, but that does not hold true under 42 U.S.C. 3613. A city is within the definition of a person under 3613, and discussion of and reasons for this conclusion can be found in *United States v. City of Parma, Ohio*, supra. Stated very briefly, the definition is and was meant to be much broader from the legislative history; the word "include" was used in delineating applicable categories in the statutes, indicating unnamed other categories may also be in the definition; and "corporations" is one of the categories under which a strong argument for the inclusion of cities could be made, since public corporations are not excluded from the definition.

6. The next point to be considered in this suit is whether actions of the City of Black Jack were facially valid, that is, valid if there was no impermissible discrimination.

Incorporation of the city was conducted under 89.010, R.S.Mo. 1969, and all of the evidence presented indicates that on August 6, 1970, the City of Black Jack was statutorily validly created by the St. Louis County Council. Following the lifting of the court order, the zoning ordinance was validly passed according to statute, on October 20, 1970.

7. The zoning ordinance, in not allowing multi-family residences, raises additional questions with which this Court must

deal. The most important of these is whether a single-use zoning ordinance is valid under Missouri law. This issue of single-use zoning (to say Black Jack is single use is not entirely accurate, but for all practical purposes for issues herein presented, it is) has been presented to the Missouri courts, *Bosch v. Village of Uplands Park*, 494 S.W.2d 339 (Mo.S.Ct. 1973); *McDermott v. Calverton* Park, 454 S.W.2d 577 (Mo.S.Ct. en banc 1970). In these cases the Supreme Court of Missouri upheld single-use zoning as not invalid per se. Although the Court noted that not all single-use zoning would be reasonable, and, thus, upheld, there is a presumption of validity of a zoning ordinance, *Flora Realty & Investment Co. v. City of Ladue*, 246 S.W.2d 771 (Mo.S.Ct. en banc 1952). The burden is upon the attacker to show the invalidity and the Government has not met that burden in this case.

8. The Government contends that Park View Heights had bought this land in reliance on the zoning, and that Park View Heights is denied due process by the zoning. By wanting to build multi-family housing on property zoned single-family, the Park View Heights Corporation wished to build a non-conforming use. By Missouri law a non-conforming use must be in existence to survive the zoning law, *Pearce v. Lorson*, 393 S.W.2d 851 (St.L.Ct.App. 1965). The fact that land was bought with a non-conforming use in mind at a time when the zoning allowed such use makes no difference. *Pearce v. Lorson*, supra. This is true even where the land is worth more with the non-conforming use, *Pearce v. Lorson*, supra; *City of St. Paul v. Chicago, St.P., M. & O. Ry. Co.*, 413 F.2d 762 (8th Cir. 1969). Since the plans for the multi-family dwelling were not even completed until December 1970, and no use was made of the land prior to the single-family zoning by the city, the zoning law is facially valid against Park View Heights, in view of the fact federally subsidized housing is not exempt from the zoning law. Whether the land was zoned multi-family under county law or unzoned on September 8, 1970, is irrelevant.

9. The Court is then faced with the issues that brought this lawsuit to this Court. Were the actions of the City of Black Jack invalid because motivated by racial discrimination, or because of alleged racially-discriminatory purpose and effect? This Court's review of the validity of the zoning ordinance is limited to whether the ordinance is arbitrary, unreasonable or without a rational basis, since the ordinance is legislative in character, *City of St. Paul v. Chicago, St.P., M. & O. Ry. Co.*, supra.

The plaintiff has argued in this case that the showing of any racial sentiment whatsoever, at any level, shows that the purpose of the ordinance was to exclude Park View Heights on account of "race, color, creed or national origin." Some of the cases cited by plaintiff do contain broad language, *Crow v. Brown*, 332 F.Supp. 382 (N.D.Ga. 1971); *Banks v. Perk*, 341 F.Supp. 1175 (N.D.Ohio 1972). However, the law has not gone so far that a few isolated racial statements by resident voters of a city, with no other proof or relation to an ordinance, will make that ordinance racially motivated.

In this instance, the plaintiff is alleging that the zoning ordinance of the City of Black Jack was motivated by the racial prejudices of its citizens, or had as its purpose or intent discrimination due to race. Evidence of statements, either directly or by insinuation, racial letters, meetings, and phone calls were introduced to prove this. Most of the offered proof consisted of anonymous statements or phone calls, non-resident letters, or letters concerned with other than racial reasons, and meetings outside the city limits of Black Jack, much of which is not probative to the actions of the City of Black Jack. When the Government's evidence of motivation, purpose, or intent is analyzed, racial statements can be attributed to a very insignificant number of Black Jack residents and possibly one zoning commissioner of twelve. It should be noted that the Government also contends that the leaders of this movement warned the people not to mention race. The proof of such was sparse for the result

indicated by the evidence, or lack of evidence, of racial expression presented by the plaintiff.

The evidence in this case does not support a charge of racial motivation, purpose, or intent in the incorporation of Black Jack as a city or the passing of Black Jack's zoning ordinance. We are not in this case dealing with only the action of private parties, but with the otherwise valid actions of governing bodies. In testing the validity of an action of the government of a city, county, state, or country against a charge of racial discrimination, it would be ludicrous to contend that the feelings and personal prejudices of every resident or even governmental officer of that government must be examined. Personal feelings or prejudices unexpressed and unmanifested in action would become the test of the validity of governmental action. Although it is true very few officials will openly state racial reasons for their actions, racial considerations must be shown as part of the legislation or as a significant reason for the legislation. It is not enough merely to allege such discrimination.

As applied to Black Jack, the zoning commission consisted of twelve (12) people, including two blacks. The zoning ordinance passed unanimously. The Government contended one of the blacks was a reluctant ordinance supporter, even though the same man was willing to take a position on a different vote that was 10-2 against him. Multiple reasons were advanced for opposition to apartments, among them the character of the community, road congestion, school impaction, property devaluation, and opposition to transient apartment dwellers. The plaintiff attempted to prove all these non-racial reasons erroneous, and often got so far as to get the witness who cited one to admit he had been wrong. However, such fact hardly proves that these reasons did not constitute all or part of the motivation, purpose, or intent in opposing apartments. These are valid state reasons to pass such an ordinance and supply a rational basis for the actions of the City of Black Jack.

The evidence offered by the Government does not show arbitrariness, unreasonableness, discrimination, or lack of a rational basis for the zoning ordinance by Black Jack. The action of the City of Black Jack in passing the zoning ordinance was not due to racial motivation, purpose, or intent.

10. The Government's next major argument is that the effect of this zoning ordinance was to perpetuate racial discrimination in housing because: (1) more blacks than whites would be served by Park View Heights, and (2) Park View Heights would contain a higher percentage of blacks to whites than Black Jack presently does.

11. The Government has supplied this Court with many statistics to prove the effect of the action of Black Jack, most of which are of little to no probative value. From these statistics, the racial composition of the group to be served by PVH is sought to be established, therefore, showing the allegedly racial effect of excluding PVH.

Park View Heights will serve the income range of approximately $5,000 to $10,000. A fortiori, if Park View Heights is built, only that group will be served, and the exclusion of PVH is keeping out only these people. Therefore, statistics such as 85% of the blacks in the SMSA are excluded from Black Jack by economic conditions, or that 79% of the blacks and 51% whites in the SMSA make below $10,000, do not prove discrimination.

The Government has introduced statistics to the effect that 32% of the blacks and 29% of the whites make between $5,000 to $10,000, and 58% of the blacks and 39% of the whites in this income range rent their homes. The former statistic is all that is relevant. The latter is not because: (1) it is not illegal to discriminate against apartment dwellers without regard to race, color, creed, or national origin, and this statistic introduces that

classification, and (2) more blacks than whites may rent due to past discrimination, rather than choice, but that is not at issue here, and to use a statistic showing that blacks are confined to a certain type of housing in an argument for building that type of housing for them in a different location is contradictory. Thus, the percentage of each race that Park View Heights is designed to serve is very close to the same, and the effect of excluding this class is not racially discriminatory.

12. The remaining argument to show a racially discriminatory effect is that there would be a higher proportion of blacks in Park View Heights than in the City of Black Jack, and its exclusion is, therefore, preventing integration. This argument cannot be sustained.

Plaintiff's statistics show that low to moderate income renters are 78% white and 22% black and that Black Jack is 98% white and 2% black. The plaintiff advances these statistics to show that the introduction of Park View Heights with even a smaller than average black percentage would add to integration in Black Jack, and, thus, the effect of excluding Park View Heights is discriminatory.

However, plaintiff's statistics also show that there is a higher percentage of blacks (27%) of all incomes that rent than of the lower to moderate income range. Since plaintiff's statistics were not compiled from only federally-subsidized multi-family dwellings, and all multi-family dwelling developers and owners must comply with the Fair Housing Laws, then the introduction of any multi-family dwelling to Black Jack would result in more integration in housing. This means that an otherwise valid zoning ordinance could not be upheld when challenged by the Government or any private developer of multi-family dwellings until such time as the "proper" racial mix is achieved. The result would be the exemption not only of federally-subsidized housing from local zoning, a step Congress refused to take, but

the exemption of all multi-family dwellings from local zoning controls in disporportionate cities. The valid interests of the citizenry and community in planning would be supplanted by regional, flexible planning disassociated from local government and ignoring the valid desires and needs of the people in the immediate area. This is beyond judicial review of zoning ordinances, and a step this Court will not take.

Plaintiff has failed to make a statistical case of racially discriminatory effect sufficient to overcome these interests, and the zoning ordinance of Black Jack must be upheld. Accordingly, this action will be dismissed.

The defendant's request for attorneys' fees is denied for the same reasons expressed in the memorandum of this Court, dated March 30, 1972, in this action.

Dated this 20th day of March, 1974.

/s/ JAMES H. MEREDITH
United States District Judge

United States Court of Appeals
For the Eighth Circuit

No. 74-1345
and
No. 74-1378

United States of America,
Appellant-Appellee,
v.
City of Black Jack, Missouri,
Appellee-Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: October 15, 1974
Filed: December 27, 1974

Before Heaney, Bright and Ross, Circuit Judges.

Heaney, Circuit Judge.

This action was brought by the United States against the City of Black Jack, Missouri, under Title VIII (Fair Housing) of the Civil Rights Act of 1968. 42 U.S.C. § 3601 *et seq.* The complaint alleged that the City had denied persons housing on the basis of race, in violation of § 3604(a), and had interfered with the exercise of the right to equal housing opportunity, in violation of § 3617, by adopting a zoning ordi-

nance which prohibited the construction of any new multiple-family dwellings. In particular, it alleged that the ordinance operated to preclude construction of a low to moderate income integrated town-house development known as Park View Heights.[1]

The District Court recognized that,

> * * * where a municipality exercises its zoning powers in a racially discriminatory manner and thereby excludes housing which provides rental opportunities for significant numbers of non-white persons, such conduct constitutes a violation of 42 U.S.C. § 3604(a). * * *

United States v. City of Black Jack, Missouri, 372 F.Supp. 319, 327 (E.D. Mo. 1974).

However, it held that the United States had failed to prove that there was any racially discriminatory effect or that the City had operated with racially discriminatory motives, and that, therefore,

> * * * [t]his Court's review of the validity of the zoning ordinance is limited to whether the ordinance is arbitrary, unreasonable or without a rational basis * * *.

Id. at 328.

Finding that the ordinance had none of those qualities, the court held that there was no violation of Title VIII and denied relief. We reverse.

The factual background of the litigation is set forth in the District Court's reported opinion. We repeat here those facts

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[1] Similar allegations were made in an earlier unrelated action brought by the developer, a sponsor, and prospective residents of Park View Heights *See Park View Heights Corp. v. City of Black Jack*, 467 F.2d 1208 (8th Cir. 1972), *reversing* 335 F.Supp. 899 (E.D. Mo. 1971).

relevant to this appeal. In 1970, the Black Jack area was unincorporated and was governed locally by St. Louis County. The county had adopted a master plan in 1965 which embraced the 1,700 acres which were later to become the City of Black Jack. That plan designated sixty-seven acres for multiple-family construction. In 1970, 15.2 of those acres were occupied by 321 apartments, 483.1 acres were occupied by single-family dwellings, and the rest of the land was undeveloped.

In 1969, the Inter Religious Center for Urban Affairs (ICUA) began planning Park View Heights to create alternative housing opportunities for persons of low and moderate income living in the ghetto areas of St. Louis. After a search for an appropriate site, ICUA settled on 11.9 acres on Old Jamestown Road, then in an unincorporated area, but now within the City of Black Jack. The site was designated for multiple-family structures. An option was obtained on the land, and in March, 1970, the sponsors filed a preliminary application with the Federal Housing Administration for initial approval of a proposed § 236 development. The original plans envisioned 108 units comprised of two-story townhouses. Within a month, the proposal became a matter of public knowledge, and public opposition was swift and active.

On June 5, 1970, HUD issued a "feasibility letter," which amounted to a green light for federal funding, and which was accompanied by a reservation of federal funds for the development. As stated in *Park View Heights Corp. v. City of Black Jack*, 467 F.2d 1208, 1211 (8th Cir. 1972):

> Upon learning of the "feasibility letter," area residents began a drive to incorporate the area including the site of the proposed Park View Heights apartments. On June 26, 1970, the Citizens for the Incorporation of Black Jack presented two petitions requesting incorporation with 1,425 signatures to the St. Louis County Council. Between June

> 26, 1970 and August 6, 1970, the St. Louis County Department of Planning reported to the St. Louis County Council that they "strongly opposed the act of incorporation on fiscal, planning, and legal grounds." Despite this opposition, the St. Louis County Council incorporated the City of Black Jack, Missouri, on August 6, 1970.
>
> * * * * * * * *
>
> Between the date of the municipal incorporation and September 15, 1970, the municipal authority of the City of Black Jack was suspended by a Writ of Prohibition issued by a state court. Within six days after the writ was dissolved, the city Zoning Commission issued notices of hearings on a zoning ordinance * * *.

The ordinance was enacted by the City Council on October 20, 1970. It prohibited the construction of any new multiple-family dwellings and made present ones nonconforming uses.

The racial composition of Black Jack and the surrounding area was set forth by the District Court in its opinion, and is not contested by the parties:

> Statistical information submitted shows that at the relevant time the area which is now the City of Black Jack was virtually all white with a black population of between 1% and 2%. The area of St. Louis County north of Interstate Highway 270, which includes Black Jack, is approximately 99% white.
>
> * * * * * * * *
>
> The virtually all-white character of Black Jack was in marked contrast to the racial composition of other parts of the St. Louis area. In 1970, the pupil population of the City of St. Louis School District was 65.6% black. * * * In 1970, the Kinloch School District, which is only two miles from the nearest boundary of the Hazelwood

School District [of which Black Jack is a part], had 1,245 students, all of whom were black.

The percentage of blacks in St. Louis County has increased only slightly overall from 4.1% in 1950 to 4.8% in 1970. During the same period, the percentage of blacks in the City of St. Louis more than doubled from 17.9% to 40.9%.

Between 1950 and 1970, the population of the city declined * * * [by] 27%, while the population of the county more than doubled * * *. From 1960 to 1970, there were approximately 102,298 new housing starts in the county, and 15,348 in the city, a ratio of almost 7 to 1. During the same period, the city had a net decrease of 24,548 housing units, while the county had a net increase of 84,169. * * *

The concentration of blacks in the city and in pockets in the county is accompanied by the confinement of a disproportionate number of them in overcrowded or substandard accommodations. The 1970 census reveals that in St. Louis city and county approximately 40% of the black families, as compared with 14% of the white families, lived in overcrowded units. * * *

United States v. City of Black Jack, Missouri, supra at 325.

The District Court further found that the average cost of a home in the City of Black Jack in 1970 was approximately $30,000, and that the average income of Black Jack families is approximately $15,000 per year. It found that Park View Heights was designed to meet the housing needs of families making between $5,528 and $10,143 per year.

Two peripheral issues raised by the City on appeal may be summarily disposed of. First, Black Jack asserts that a municipality may not be sued under Title VIII because it is not a

"person" within the meaning of §§3602 and 3613. It urges that the analogous cases of *City of Kenosha v. Bruno*, 412 U.S. 507 (1973), and *Monroe v. Pape*, 365 U.S. 167 (1961), which dealt with §1983, are controlling. The District Court properly rejected this claim. Both *Monroe* and *Kenosha* emphasized explicit legislative history peculiar to §1983. Title VIII, on the other hand, was passed almost one hundred years after the initial enactment of §1983, and there is no similar legislative history. To hold that local government is immune from the proscriptions of Title VIII

> * * * turns the old "state action" controversy on its head. * * * It is simply too late in the day now to say that judicial control is impossible for the very reason that the state is involved. Whatever one thinks of state action as a viable limiting principle on the constitutional command of equality, it should at least be clear that the most outrageous deprivations of equal rights are those perpetrated by the state itself. * * * We are unwilling to believe that the legislators who voted for [Title VIII] intended to exempt the most serious offenses from its coverage.

Mayers v. Ridley, 151 U.S.App.D.C. 45, 465 F.2d 630, 635 (1972) (en banc) (J. Skelly Wright, J., concurring). *See also Citizens Committee for Faraday Wood v. Lindsay*, 362 F.Supp. 651, 653 (S.D.N.Y. 1973).

Second, Black Jack asserts that the District Court erroneously refused to abstain, and that the matter was one properly left to the state courts. However,

> * * * Congress [has] imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. * * *

Zwickler v. Koota, 389 U.S. 241, 248, 88 S.Ct. 391, 395, 19 L.Ed.2d 444 (1967).

Although this action was brought under a federal statute rather than under the Constitution, the statute was enacted as an aid to enforcement of the Thirteenth Amendment. We see no sound reason upon which to justify denying the plaintiff a federal forum. *See Kennedy Park Homes Ass'n v. City of Lackawanna*, 436 F.2d 108, 112 (2nd Cir. 1970), cert. denied, 401 U.S. 1010, 91 S.Ct. 1256, 28 L.Ed.2d 546 (1971).

We turn then to the merits of the decision below. Congress has declared that the purpose of the Fair Housing Act of 1968 is "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. The Act was passed pursuant to congressional power under the Thirteenth Amendment to eliminate the badges and incidents of slavery. In construing the Civil Rights Act of 1866, also founded on that power, the Supreme Court has declared that

> * * * when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.

Jones v. Mayer Co., 392 U.S. 409, 442-443 (1968).

Title VIII is designed to prohibit "all forms of discrimination, sophisticated as well as simple-minded." *Williams v. Matthews Co.*, 499 F.2d 819, 826 (8th Cir. 1974). Just as Congress requires

> * * * the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification[,]

Griggs v. Duke Power Co., 401 U.S. 424, 430-431 (1971), such barriers must also give way in the field of housing. The discretion of local zoning officials, recently recognized in *Village of Belle Terre v. Boraas*, 39 L.Ed.2d 797 (1974), must be curbed where "the clear result of such discretion is the segregation of low-income Blacks from all White neighborhoods." *Banks v. Perk*, 341 F.Supp. 1175, 1180 (N.D. Ohio, 1972), *aff'd in part & rev'd in part without opinion*, 473 F.2d 910 (6th Cir. 1973).

The burden of proof in Title VIII cases is governed by the concept of the "prima facie case." *Williams v. Matthews Co., supra* at 826. To establish a prima facie case of racial discrimination, the plaintiff need prove no more than that the conduct of the defendant actually or predictably results in racial discrimination; in other words, that it has a discriminatory effect. *See id.; United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach*, 493 F.2d 799, 808 (5th Cir. 1974); *Hawkins v. Town of Shaw, Mississippi*, 461 F.2d 1171, 1172 (5th Cir. 1972) (en banc); *Kennedy Park Homes Ass'n v. City of Lackawanna, supra* at 114; *Dailey v. City of Lawton, Oklahoma*, 425 F.2d 1037, 1039 (10th Cir. 1970); *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920, 931 (2nd Cir. 1968). The plaintiff need make no showing whatsoever that the action resulting in racial discrimination in housing[2] was racially motivated.[3] *See Williams v. Matthews Co., supra* at 826; *United*

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[2] This holding is consistent with cases involving racial discrimination in other areas. *See Wright v. Council of City of Emporia*, 407 U.S. 451, 462 (1972) (schools); *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (employment); *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961) (restaurant); *Hawkins v. Town of Shaw, Mississippi*, 461 F.2d 1171, 1174 (5th Cir. 1972) (en banc) (Wisdom, J., concurring) (municipal services).

[3] The United States contends that the ordinance ought also be enjoined because it was enacted for the purpose of excluding blacks. There is evidence in the record to support that contention. Opposition to Park View Heights was repeatedly expressed in racial terms by persons whom the District Court found to be the leaders of the

Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach, supra at 808; *Kennedy Park Homes Ass'n v. City of Lackawanna, supra* at 114; *Citizens Committee for Faraday Wood v. Lindsay, supra* at 658; *Banks v. Perk, supra* at 1180. Effect, and not motivation, is the touchstone, in part because clever men may easily conceal their motivations, but more importantly, because

> * * * [w]hatever our law was once, * * * we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous to private rights and the public interest as the perversity of a willful scheme.

Hobson v. Hansen, 269 F.Supp. 401, 497 (D. D.C. 1967), *aff'd sub nom. Smuck v. Hobson,* 408 F.2d 175 (D. C. Cir. 1969) (en banc).

Once the plaintiff has established a prima facie case by demonstrating racially discriminatory effect, the burden shifts to the governmental defendant to demonstrate that its conduct was necessary to promote a compelling governmental interest.[4] *See*

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incorporation movement, by individuals circulating petitions, and by zoning commissioners themselves. Racial criticism of Park View Heights was made and cheered at public meetings. The uncontradicted evidence indicates that, at all levels of opposition, race played a significant role, both in the drive to incorporate and the decision to rezone. We agree with the Tenth Circuit's conclusion that improper purpose may be shown circumstantially:

> * * * If proof of a civil right violation depends on an open statement by an official of an intent to discriminate, the Fourteenth Amendment offers little solace to those seeking its protection. In our opinion, it is enough for the complaining parties to show that the local officials are effectuating the discriminatory designs of private individuals. * * *

Dailey v. City of Lawton, 425 F.2d 1037, 1039 (10th Cir. 1970). Nevertheless, we do not base our conclusion that the Black Jack ordinance violates Title VIII on a finding that there was an improper purpose.

[4] The requirement that a governmental defendant demonstrate that its conduct is necessary to further a compelling governmental interest is most often expressed in cases involving equal protection

United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach, supra at 809; *Gautreaux v. City of Chicago*, 480 F.2d 210, 216 (7th Cir. 1973) (Swygert, J., concurring), *cert. denied*, 414 U.S. 1144 (1974); *Kennedy Park Homes Ass'n v. City of Lackawanna, supra* at 114; *Hawkins v. Town of Shaw, Mississippi*, 437 F.2d 1286, 1288 (5th Cir. 1971), *aff'd en banc*, 461 F.2d 1171 (1972). *See also Village of Belle Terre v. Boraas, supra* at 802 (dictum).

The District Court concluded that the ordinance had no discriminatory effect. It based this conclusion on its finding that, because Park View Heights was designed to meet the needs of families earning between $5,000 and $10,000 per year—a class including 32 percent of the black population in the metropolitan area and 29 percent of the white population—the ordinance had no measurably greater effect on blacks than on whites. The court's conclusion was in error. It failed to take into account either the "ultimate effect" or the "historical context" of the City's action. *See United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach, supra* at 810; *Kennedy Park Homes Ass'n v. City of Lackawanna, supra* at 112. The ultimate effect of the ordinance was to foreclose 85 percent of the blacks living in the metropolitan area from obtaining housing in Black Jack, and to foreclose them at a time when 40 percent of them were living in substandard or overcrowded units.

The discriminatory effect of the ordinance is more onerous when assessed in light of the fact that segregated housing in the St. Louis metropolitan area was

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challenges to statutes or ordinances creating "suspect classifications," *see In re Griffiths*, 413 U.S. 717 (1973); *Korematsu v. United States*, 323 U.S. 214 (1944), or impinging on "fundamental rights." *See Shapiro v. Thompson*, 394 U.S. 618 (1969); *Skinner v. Oklahoma*, 316 U.S. 535 (1942). Even though this case is based on a federal statute, rather than on the Fourteenth Amendment, we believe that, once the United States established a prima facie case of racial discrimination, it became proper to apply the compelling governmental interest requirement of the equal protection cases.

> * * * in large measure the result of deliberate racial discrimination in the housing market by the real estate industry and by agencies of the federal, state, and local governments. * * *

United States v. City of Black Jack, Missouri, supra at 326.[5]

Black Jack's action is but one more factor confining blacks to low-income housing in the center city, confirming the inexorable process whereby the St. Louis metropolitan area becomes one that "has the racial shape of a donut, with the Negroes in the hole and with mostly Whites occupying the ring." *Mahaley v. Cuyahoga Metropolitan Housing Authority*, 355 F.Supp. 1257, 1260 (N.D. Ohio, 1973), *rev'd*, 500 F.2d 1087 (6th Cir. 1974). *See also Crow v. Brown*, 332 F.Supp. 382, 384 (N.D. Ga., 1971), *aff'd per curiam*, 457 F.2d 788 (4th Cir. 1972). Park View Heights was particularly designed to contribute to the prevention of this prospect so antithetical to the Fair Housing Act. The Board of Directors of the Park View Heights Corporation was one-half white and one-half black. Affirmative measures were planned to assure that members of the black community would be aware of the opportunity to live in Park View Heights. There was ample proof that many blacks would live in the development, and that the exclusion of the townhouses would contribute to the perpetuation of segregation in a community which was 99 percent White.

It having been established that the ordinance had a discriminatory effect, it follows that the United States had made out a prima facie case under Title VIII, and the burden shifted to the City to demonstrate that a compelling governmental interest was furthered by that ordinance. We turn to that question. The City asserted primarily the following governmental interests to justify the ban on further apartments:

(1) Road and traffic control;

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[5] The parties stipulated to this at trial.

(2) Prevention of overcrowding of schools;

(3) Prevention of devaluation of adjacent single-family homes.

Several other interests were also alluded to in the record, including exclusion of apartments where there were already too many and where there was no need for them.

In determining whether any of these rise to the level of a compelling governmental interest, we must examine: first, whether the ordinance in fact furthers the governmental interest asserted; second, whether the public interest served by the ordinance is constitutionally permissible[6] and is substantial enough to outweigh the private detriment caused by it;[7] and third, whether less drastic means are available whereby the stated governmental interest may be attained. *See Shapiro v. Thompson*, 394 U.S. 618, 637 (1969); Note, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645, 1651 (1971).

We need not go beyond the first step in the inquiry, for we find that there is no factual basis for the assertion that any one of the three primary interests asserted by the City is in fact furthered by the zoning ordinance, and we find that the other asserted interests—at least on the facts of this case—are clearly not substantial in relation to the housing opportunities foreclosed. To paraphrase the Supreme Court in *Shapiro v. Thompson, supra*

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[6] This portion of the analysis is essentially a qualitative one. For example, *Shapiro v. Thompson, supra* at 629-631, held that it was constitutionally impermissible for a state to inhibit migration by needy persons into the state, because such migration was a constitutional right. That case further held that limiting payment of welfare benefits to those who had "contributed" to the state in the past through taxes was constitutionally impermissible. *Id.* at 633.

[7] This portion of the analysis is essentially quantitative. For example, preservation of the public peace and welfare by avoiding racial conflict was held insufficient to validate a zoning ordinance restricting racial integration in *Buchanan v. Warley*, 245 U.S. 60 (1917).

at 638, we conclude that the City does not use and has no need to use the ordinance for the governmental purposes suggested.

On the subject of roads and traffic, Mr. Barbero, the City's former mayor and lead witness, conceded on cross-examination that his opposition to Park View Heights on the basis of its impact on traffic and roads was based on incorrect information and was, therefore, wrong. The evidence amply supports his concession. Park View Heights was to be located next to Old Jamestown Road, which is the most direct route from Black Jack to Jamestown Mall, a large shopping center in the process of construction which is to have ninety-five stores and is to employ approximately 2500 persons. The City did not oppose the construction of the Mall, despite the fact that it would generate far more traffic than would Park View Heights. Moreover, there was uncontradicted evidence that construction of single-family homes on the proposed site would result in numerous driveways leading onto Old Jamestown Road, creating a serious traffic hazard on the shopping center's main access road which would be avoided by a multiple-family dwelling with a single driveway.

The asserted community interest in preventing overcrowding of the schools also was not furthered by the ordinance. The St. Louis County Planning Department had determined that, in the school district which embraced Black Jack, apartments produced approximately one schoolchild for every five families, while single-family houses produced almost three schoolchildren, or fifteen times as many. In the light of that evidence, several defense witnesses conceded that the desire to prevent overcrowding of the school system could not supply a rational basis for the ordinance, and defense counsel stated at one point in the trial that school impaction was not an issue in the case. Moreover, there was nothing in the record to indicate that the school facilities were already overcrowded.

The third asserted justification of preventing devaluation of adjoining single-family homes was also not furthered by the ordinance. The St. Louis Planning Department, after conducting a study, concluded that apartment complexes in the St. Louis metropolitan area had not had such an effect on property values. This conclusion was buttressed by the testimony of expert witnesses, and was not contradicted by any competent evidence.

None of the other reasons advanced by the City is a substantial one on the basis of the record. The assertion that there were already "too many" apartments in Black Jack was not borne out by the evidence. Under the original plan set up by St. Louis County for the Black Jack area, less than four percent of the land was set aside for apartments. The expert testimony was that this was a conservative allocation and that Black Jack's topography and work force could accommodate different types of residential dwellings. The effect of the ordinance was to slash the conservative four percent figure to less than one percent. There was no expert testimony that this was necessary to prevent unacceptable density. The assertion that there was no "market" or "need" for Park View Heights in the Black Jack area was also unsupported. The evidence was to the contrary, for it demonstrated a strong demand for suburban apartments in St. Louis County.

We hold that Zoning Ordinance No. 12 of the City of Black Jack violates Title VIII, because it denies persons housing on the basis of race, in violation of §3604(a), and interferes with the exercise of the right to equal housing opportunity, in violation of §3617. The remedy for this violation of the Fair Housing Act is provided in §3615:

> * * * any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid.

We, therefore, reverse and remand with instructions to the District Court to enter a permanent injunction upon receipt of this Court's order, enjoining the enforcement of the ordinance.[8] The mandate of this Court shall be issued forthwith.

Reversed and remanded.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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[8] Since we award relief to the United States, the defendant's contention that the District Court erred in refusing to award attorney fees to the defendant is without merit.

United States Court of Appeals
For the Eighth Circuit

September Term, 1974

No. 74-1345
United States of America,
Appellant,

vs.

City of Black Jack, etc.,
Appellee.

No. 74-1378
United States of America,
Appellee,

vs.

City of Black Jack, Missouri, etc.,
Appellant.

Appeals from the United States District Court for the Eastern District of Missouri.

The Court having considered petition for rehearing en banc filed by counsel for appellee-appellant, City of Black Jack, Missouri, etc. and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

January 20, 1975

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No. 74-1293

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

CITY OF BLACK JACK, MISSOURI, Petitioner

vs.

UNITED STATES OF AMERICA, Respondent

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Eighth Circuit

BRIEF OF AMICUS CURIAE, CITY OF PARMA, OHIO

INTEREST OF AMICUS CURIAE

This amicus curiae brief is being filed pursuant to Rule 42-4 of the Rules of the Supreme Court of the United States, by the City of Parma, Ohio, a political subdivision of the State of Ohio, and is sponsored by its City Solicitor, the authorized law officer thereof.

Parma is vitally interested in the outcome of this litigation because it also has been sued by the Attorney General under color

of 42 U.S.C. Section 3613. It sought to challenge the constitutionality of the Act of Congress relied on by the Attorney General by means of a counterclaim filed in the action pending against it, but the counterclaim was dismissed by the district court. An appeal from that order was filed in the Court of Appeals for the Sixth Circuit under 28 U.S.C. Section 1292 (a) (1), but was dismissed, and this Court denied certiorari on March 31, 1975.

The same jurisdictional and constitutional questions inhere in this litigation. Parma seeks to highlight these questions, which in its view are primary and fundamental, and to urge granting of certiorari so that these important issues can be resolved. It is of vital consequence to the Nation that an arm of the national government seeks to intrude upon and interfere with the reserved powers and authority of local governments. It seeks to do so under the guise of enforcing an Act of Congress which was intended to regulate the real-estate industry and not to violate the principles of federalism and separation of powers which are fundamental to our form of government.

ARGUMENT

Concept of Home Rule is Under Attack

Acting under color of 42 U.S.C. Section 3613, the Attorney General filed suit in the name of the United States of America against the little City of Black Jack, Missouri, asserting that by its enacting a comprehensive zoning ordinance, limiting new residential construction to single-family houses and making existing

apartments nonconforming uses, Black Jack allegedly violated the "Fair Housing" Title VIII of the Civil Rights Act of 1968 (42 U.S.C. Section 3601 et seq.).

However, Black Jack is not engaged in any aspect of the residential real-estate business, and so none of the prohibitions specified in 42 U.S.C. Section 3604 were violated by that municipality. It neither sells nor rents dwellings, nor finances their purchase, nor performs real-estate brokerage services, nor advertises dwellings for sale or rent, nor engages in "blockbusting". Nowhere in said section is it stated that enacting a comprehensive zoning ordinance limiting new construction to single-family houses is unlawful.

Black Jack is a municipal corporation -- a body politic exercising local governmental "home rule" powers, among which is the power to zone land within its territorial boundaries. Zoning land is the epitome of a local-governmental function, outside the ambit of powers delegated to the national government by the Constitution. As a matter of fact, the legislative branch of the national government has been delegated local-government authority only over the seat of the national government, the District of Columbia, by Article I, Section 8 of the Constitution. Even so, Congress has recently condescended to grant a measure of home rule to the residents of the district, who were not enthralled by any demonstrated superior ability of the national government to run a city. The thrust of the agitation for home rule was the innate desire of Americans, wherever they live, for home rule. "Please, big brother, we'd rather do it ourselves" is a theme not confined to television commercials.

Fundamental Issue of Jurisdiction

"At the outset it should be noted that the federal district courts are courts of limited jurisdiction. It is not their function to serve merely as a zoning appeal board. The individual merits of local zoning matters are appropriately left to the sound discretion of local zoning authorities." Rockbridge Associates, Ltd. v. Pruitt, 341 F. Supp. 703, 705 (N.D. Ga. 1971), aff'd en banc 491 F. 2d 5 (5th Cir. 1974), cert. den. sub. nom. South Gwinnett Venture, et al. v. Pruitt, 419 U.S. 837 (1974).

Jurisdiction is not a mere "peripheral" issue in the sense that it is "concerned with the comparatively superficial or not really essential aspects of the subject in question" (Random House Dictionary of the English Language, College Edition 988 (1968), as implied by the court of appeals (508 F. 2d 1179, 1183). Rather, it is of first importance, and "it is the duty of this court to see to it that the jurisdiction of the /district court/, which is defined and limited by statute, is not exceeded." City of Kenosha v. Bruno, 412 U.S. 507, 511 (1973).

It is desirable to investigate the jurisdictional basis for this action in greater depth than the superficial treatment accorded this fundamental question by the court of appeals. Thus, the thrust of this brief goes to the jurisdictional issue and not at this time to the deficit of reasoning of the court below.

A City Is Not a "Person" Amenable to the Act

42 U.S.C. Section 3602 (d) defines "Person" to include "one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, receivers, and fiduciaries." Nowhere in that comprehensive definition are states or municipal corporations mentioned. The definitions section clearly reveals that commercial entities and personal representatives, but not bodies politic, were to be amenable to the Act, along with individuals.

It is a general rule of statutory construction that governments, whether federal or State, and their subdivisions are not ordinarily considered within the purview of a statute, however general or comprehensive the language of the Act may be, unless the intention to include them is clearly manifest, as when they are expressly named therein or included by necessary implication.

"Neither the Government nor political subdivisions not included in the general wording of the statute are affected thereby unless it be clear and indisputable from the contents of the statute or that it be expressly included in the text of the statute before it would be subject to its terms." Wilcox v. City of Idaho Falls, 23 F. Supp. 626 (D.C. N.D. Idaho 1938).

Furthermore, the United States Code's general definitions section, 1 U.S.C. Section 1,

generally defines "person" to include "partnerships and corporations". Prior to the revision of that definitions statute in 1872, the term employed was bodies politic and corporate. The reason for the deliberate omission of the term "body politic" from said general definitions section was to make it clear that "'corporation' should be confined to an association of natural persons on whom government has conferred continuous succession". See Reviser's Note, Vol. I, Rev. U.S. Stats. 1872, P. 19; Monroe v. Pape, 365 U.S. 167, 190 (N. 47) (1961). For this Court's ruling that a municipal corporation is not embraced within the term "person" employed in the Civil Rights Act of 1866, see City of Kenosha v. Bruno, supra.

Had the Congress intended to include States and municipalities within the ambit of 42 U.S.C. Section 3601 et seq., it would have specifically so provided. In common usage the term "person" does not include the sovereign or its political subdivisions, and statutes employing the term "person" will not ordinarily be construed to do so. "Congress made express provision, R.S. Section 1, 1 U.S.C. Section 1, for the term to extend to partnerships and corporations.... The absence of any comparable provision extending the term to sovereign governments implies that Congress did not desire the term to extend to them." United States v. United Mine Workers of America, 330 U.S. 258, 275 (1947).

This Court expressed the desirability of judicial restraint in statutory construction in United States v. Cooper Corp., 312 U.S. 600, 605 (1940):

> "/W/e are to read the statutory language in its ordinary and natural sense, and if doubts remain, resolve them in the light, not only of the policy to be served by the enactment, but, as well, by all available aids to construction. But it is not our function to engraft on a statute additions which we think the legislature logically might or should have made.... our function ends with the endeavor to ascertain from the words used, construed in light of the relevant material, what was in fact the intent of Congress."

Congressional Debate on Civil Rights Act of 1968

There is not one iota of testimony before committees of the Congress considering "fair housing" legislation, or in the Congressional debate on the legislation actually passed by the 90th Congress, indicating that anyone intended the Act to apply to municipalities enacting zoning legislation or otherwise exercising home-rule powers.

When he introduced the fair housing title as an amendment to the Civil Rights Act pending before Congress on February 6, 1968, Senator Mondale had inserted into the Congressional Record, at Page 2272 of Vol. 114, questions and answers concerning it. The very first question asked "Who will be covered?"

The answer was that "The Act will cover brokers, property owners, managers, and anyone else who participates in the sale, rental, or financing of housing."

Senator Brooke of Massachusetts, a co-sponsor, stressed the limited purposes and ambit of the legislation:

> "Fair housing does not promise to end the ghetto; it promises only to demonstrate that the ghetto is not an immutable institution in America. It will scarcely lead to a mass dispersal of the ghetto population to the suburbs; but it will make it possible for those who have the resources to escape the stranglehold now suffocating the inner cities of America." (Ibid. P. 2279)

Again, at pages 2282-2283, id., Senator Brooke re-emphasized the limited purpose of the legislation: "I think as the able Senator from Minnesota /Mondale/ well set forth in his opening statement, there will not be this great rush to the suburbs. There never has been. As people are educated and have the opportunity and wherewithal to move, they ought to be able to move. That is all the amendment would provide."

Not one proponent contested the articulate opponent, Senator Thurmond, when he pointed out, at Pages 2217-2218, that the legislation applied only to the private sector, and in no way involved local-governmental activity:

> The first concept to be kept in mind throughout any discussion of this title is that the subject sought to be regulated and the matter upon which it is proposed to legislate in this amendment is the private dealings between individuals. This amendment does not even purport to have any State involvement or involvement by any official person, or body of the State. The right to hold and enjoy property is a personal right which attaches to each and every individual in this country and under the laws and traditions established by the laws....what is sought to be controlled by this legislation is purely private action. (Id. pages 2217-2218).

From this very concise analysis of the wording and history of the Act, it is readily apparent that since neither Black Jack nor any other municipality is amenable to Title VIII of the Civil Rights Act of 1968, the Attorney General is without authority to bring this action, and a federal district court is without jurisdiction to hear it.

Suits to Interfere With Local Zoning Violate Federalism Principles

Even if Congress had attempted to make municipal corporations amenable to the Act and

to empower the Attorney General to bring suits against cities for enacting zoning ordinances, such attempt would be unconstitutional as violative of the principles of federalism, separation of powers, and home rule encompassed within the reserved rights recognized to exist by the Ninth and Tenth Amendments. The maintenance of the principles of federalism is a foremost consideration in interpreting any of the pertinent provisions of the Constitution under which the Court examines state action. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 44 (1973).

In Victory Carriers, Inc. v. Law, 404 U.S. 202, 212 (1971) this Court held that:

> "Due regard to the rightful independence of state governments, which should activate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which /a federal/ statute has defined."

Justice Black, in Karr v. Schmidt, 401 U.S. 1201, 1203 (1971) stated:

> "Moreover, our Constitution has sought to distribute the powers of government in this Nation between the United States and the States. Surely the federal judiciary can perform no greater service to the Nation than to leave the States unhampered in the performance of their purely local affairs."

CONCLUSION

Important questions of federal law are whether the Attorney General may intrude into the purely local matter of zoning, under the guise of enforcing the Fair Housing Title of the Civil Rights Act of 1968; whether by its terms said Act was intended to apply to municipal corporations, and if so whether such an application of the Act would be unconstitutional as violative of the principles of federalism, separation of powers, and of the reserved rights and powers inherent in the Ninth and Tenth Amendments to the Constitution of the United States. These questions have not been, but should be, settled by this Court. For this reason as well as those urged by Petitioner, amicus curiae respectfully urges that certiorari be granted.

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1293

CITY OF BLACK JACK, MISSOURI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-23 to A-37) is reported at 508 F.2d 1179. The opinion of the district court (Pet. App. A-2 to A-22) is reported at 372 F. Supp. 319.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 1974. A timely petition for rehearing was denied on January 20, 1975 (Pet. App. A-38). The petition for a writ of certiorari was filed on April 15, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether, in the circumstances of this case, petitioner's adoption of a zoning ordinance limiting new residential construction to single-family dwellings made unavailable or denied dwellings to persons because of race, in violation of Title VIII of the Civil Rights Act of 1968.

STATUTES INVOLVED

The pertinent provisions of Title VIII of the Civil Rights Act of 1968, 82 Stat. 81 *et seq.*, 42 U.S.C. 3601 *et seq.*, are set forth at Pet. 3.

STATEMENT

In 1969, the Inter Religious Center for Urban Affairs ("ICUA") secured an option to purchase 11.9 acres of land in an unincorporated area of St. Louis County, Missouri; the land had been designated by the county for multiple-family construction (Pet. App. A-25). ICUA intended to construct a development of inexpensive two-story townhouses, to be known as Park View Heights, that would provide an alternative rental housing opportunity for individuals and families residing in the ghetto areas of the City of St. Louis (*ibid.*). The proposed development received preliminary approval from the Secretary of Housing and Urban Development for federal financial assistance on June 5, 1970 (*ibid.*).

Local opposition to the proposed development "was swift and active" (*ibid.*):

> Upon learning of the "feasibility letter" [sent to ICUA by the Secretary], area residents began a drive to incorporate the area including the site of the proposed Park View Heights apartments. On June 26, 1970, the Citizens for the Incorporation of Black Jack presented two petitions requesting incorporation with

1,425 signatures to the St. Louis County Council. * * * [T]he * * * Council incorporated the City of Black Jack, Missouri, on August 6, 1970.

* * * * *

Between the date of the municipal incorporation and September 15, 1970, the municipal authority of the City of Black Jack was suspended by a Writ of Prohibition issued by a state court. Within six days after the writ was dissolved, the city Zoning Commission issued notices of hearings on a zoning ordinance which would effectively prevent the construction of new multi-family dwelling units within the City of Black Jack. On October 20, 1970, the City Council passed the proposed zoning ordinance. [*Park View Heights Corporation* v. *City of Black Jack*, 467 F.2d 1208, 1211 (C.A. 8).]

The United States then instituted this action under Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601 *et seq.*, alleging that the purpose and the effect of enacting the zoning ordinance had been to make unavailable or to deny dwellings within petitioner's boundaries to low- and middle-income black residents of the St. Louis metropolitan area. The United States offered substantial evidence that a principal purpose of the incorporation and the enactment of the zoning ordinance was to restrict the Black Jack area almost exclusively to white residents. On the question of effect, the United States showed that the population in the Park View Heights development was expected to include a substantial percentage of blacks whereas the population of Black Jack was 99 percent white, and there-

fore that enactment of the ordinance contributed to the perpetuation of residential segregation on the basis of race (Pet. App. A-3, A-11 to A-13, A-21, A-32).[1]

The district court held that the evidence of racially discriminatory purpose was insufficient to "support a charge of racial motivation, purpose, or intent in the incorporation of Black Jack as a city or the passing of Black Jack's zoning ordinance" (Pet. App. A-19). The court also determined that the zoning ordinance was not racially discriminatory in effect, because it effectively bars low- and middle-income whites, as well as blacks, from living in Black Jack (Pet. App. A-20 to A-21).

The court of appeals reversed. In the view the court took of the case, it was not necessary to determine whether the district court's finding of no racially discriminatory purpose was clearly erroneous. However, the court of appeals clearly viewed that finding as erroneous (Pet. App. A-30 to A-31, n. 3):

> Opposition to Park View Heights was repeatedly expressed in racial terms by persons whom the District Court found to be the leaders of the incorporation movement, by individuals circulating petitions, and by zoning commissioners themselves. Racial criticism of Park View Heights was made and cheered at public meetings. The uncontradicted evidence indicates that, at all levels of opposition, race played a significant role, both in the drive to incorporate and the decision to rezone. * * *

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[1] With respect to the expected population of the Park View Heights development, the court of appeals noted (Pet. App. A-33):

> Affirmative measures were planned to assure that members of the black community would be aware of the opportunity to live in Park View Heights. There was ample proof that many blacks would live in the development * * *.

But the court of appeals rested its decision upon a finding of racially discriminatory effect coupled with the fact that the ordinance failed to further any governmental interest. The court noted that the parties had stipulated that segregated housing in the St. Louis metropolitan area was "in large measure the result of deliberate racial discrimination in the housing market by the real estate industry and by agencies of the federal, state, and local governments" (Pet. App. A-33) and determined that "the exclusion of the townhouses would contribute to the perpetuation of segregation in a community which was 99 percent White" (*ibid.*). The court concluded that the governmental interests advanced by petitioner—road and traffic control, prevention of overcrowding of schools, and prevention of devaluation of adjacent single-family homes—were in fact not threatened by the proposed Park View Heights development and therefore did not justify the perpetuation of housing segregation to which the zoning ordinance would contribute.

ARGUMENT

The judgment below is correct because there was clear and sufficient evidence of impermissible racial purpose and effect in both the incorporation and the zoning. It is clear from the record, as recited by the court of appeals (Pet. App. A-23 to A-27), that petitioner was incorporated, and its restrictive zoning ordinance enacted, in order to bar construction of a proposed racially integrated housing development that had been intended for the alleviation of the effects of prior racial discrimination in the local housing market. Moreover, "[t]he uncontradicted evidence indicates that, at all levels of opposition, race played a significant role, both in the drive to incorporate and the decision to rezone" (Pet. App. A-31, n. 3).[2] The effect of the ordinance is to per-

[2]This statement by the court of appeals directly contradicts petitioner's bald assertion that the ordinance "was not motivated by, nor intended to effect, racial discrimination" (Pet. 9).

petuate a pattern of residential segregation that itself results from deliberate racial prejudice.[3] And the ordinance furthers no asserted governmental interests.[4] In these circumstances, petitioner's adoption of the zoning ordinance was unlawful under Title VIII of the Civil Rights Act of 1968.

1. Petitioner challenges the decision below as an impermissible infringement upon its municipal power to enact facially neutral zoning ordinances (Pet. 9-12). But the municipal zoning power does not extend to the enactment of racially segregatory ordinances. *Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 6. And an otherwise racially discriminatory enactment or practice cannot be sustained under Title VIII merely because it appears to be neutral on its face. *Williams* v. *Matthews Company*, 499 F.2d 819 (C.A. 8), certiorari denied November 18, 1974 (Nos. 74-63 and 74-296); *Kennedy Park Homes Ass'n* v. *City of Lackawanna, N.Y.*, 436 F.2d 108 (C.A. 2), certiorari denied, 401 U.S. 1010. Cf. *Griggs* v. *Duke Power Co.*, 401 U.S. 424; *Gomillion* v. *Lightfoot*, 364 U.S. 339.

2. Petitioner further contends (Pet. 12-14) that the court of appeals imposed a strict compelling-governmental-interest standard of review in testing the validity of the zoning ordinance under Title VIII and that a more lenient

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[3]Although petitioner asserts that "there clearly was no showing in this case of * * * a prior pattern of discrimination" (Pet. 14), in fact the parties stipulated at trial to the existence of such discrimination (Pet. App. A-33 and n. 5).

[4]Petitioner had asserted three principal interests to justify its ban against construction of Park View Heights: road and traffic control, prevention of overcrowding of schools, and prevention of devaluation of adjacent single-family homes (Pet. App. A-33 to A-34). The court of appeals carefully reviewed the evidence and concluded "that there is no factual basis for the assertion that any one of the three primary interests asserted by [petitioner] is in fact furthered by the zoning ordinance" (Pet. App. A-34).

standard of review has been applied by this Court in analogous cases brought under the Equal Protection Clause of the Fourteenth Amendment.

Petitioner misdescribes the standard of review applied by the court of appeals. Although that court did at one point refer to the applicability of the compelling-governmental-interest test (Pet. App. A-31), that test was not in fact applied here because the court concluded that, far from serving a compelling governmental interest, petitioner's zoning ordinance furthered no substantial governmental interest whatsoever (Pet. App. A-34 to A-36). See note 4, *supra*. Thus petitioner's attack upon the compelling-governmental-interest standard of review is, in the context of this case, of merely academic interest.

In any event, that strict standard of review is the one commonly applied in testing the validity of discriminatory classifications or practices under Title VIII. See, *e.g.*, *Kennedy Park Homes Ass'n* v. *City of Lackawanna, N.Y.*, *supra; United Farmworkers* v. *City of Delray Beach*, 493 F.2d 799 (C.A. 5). Application of that standard of review is an appropriate means of vindicating a policy—that of eradicating discrimination in housing on the basis of race—that Congress considered to be of the highest priority. Cf. *Lau* v. *Nichols*, 414 U.S. 563; *Trafficante* v. *Metropolitan Life Ins.*, 409 U.S. 205.

3. Finally, petitioner asserts (Pet. 15-17) that the decision below conflicts with *Ybarra* v. *City of Town of Los Altos Hills*, 503 F.2d 250 (C.A. 9), and *Mahaley* v. *Cuyahoga Metropolitan Housing Authority*, 500 F.2d 1087 (C.A. 6), certiorari denied, January 13, 1975 (No. 74-562). Those cases held that municipal exclusion of low-income housing did not, of itself, deny equal protection of the law in vio-

lation of the Fourteenth Amendment. Those cases, however, did not involve a racially discriminatory purpose for the exclusion and did not arise under the Civil Rights Act of 1968.

This case, unlike *Ybarra* and *Mahaley*, does not involve mere exclusion of low-income housing. The record reveals a concerted and single-minded effort upon the part of petitioner and its citizens to block the construction of a particular racially integrated housing development, in order to perpetuate a pattern of residential segregation on the basis of race. In these circumstances, the court of appeals' invalidation of petitioner's zoning ordinance was consistent with the decisions of other courts of appeals in similar cases. See, *e.g., Kennedy Park Homes Ass'n* v. *City of Lackawanna, N.Y., supra*; *United Farmworkers* v. *City of Delray Beach, supra*; *Morales* v. *Haines*, 486 F.2d 880 (C.A. 7); *Dailey* v. *City of Lawton, Okla.*, 425 F.2d 1038 (C.A. 10); *Southern Alameda Spanish Speaking Organization* v. *City of Union City, Cal.*, 424 F.2d 291 (C.A. 9).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1975.

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No. 74-1293

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

THE CITY OF BLACK JACK
a Municipal Corporation,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

The brief filed by the respondent in opposition to the petition so seriously misstates both the record and the opinion of the court below as to warrant a brief response.

1. The brief in opposition asserts, on several occasions, that the decision can be sustained because of the "clear and sufficient evidence" of a *purpose* to discriminate. See pages 5, 6, 8. In fact, the District Court found precisely the opposite to be true: "The evidence in this case does not support a charge of racial motivation, purpose, or intent in the incorporation of Black Jack as a city or the passing of Black Jack's zoning ordinance." Pet. App. p. A-19. The court below did not set that finding aside; it stated, expressly, that it deemed "purpose" to be irrelevant. Pet. App. A-31 n.3.[1]

Respondent cannot properly assert, therefore, that the decision in this case can be distinguished from the conflicting decisions in *Ybarra* v. *City of Town of Los Altos Hills,* 503 F.2d 250 (9th Cir. 1974) and *Mahaley* v. *Cuyahoga Metropolitan Housing Authority,* 500 F.2d 1087 (6th Cir. 1974), *cert. denied,* 419 U.S. 1108 (Pet. pp. 15-17), on the ground that "Those cases, however, did not involve a racially discriminatory purpose for the exclusion . . . ." Br. in Opp. p. 8. Nor can it properly assert that a decision, in which "purpose" is expressly held to be irrelevant, does not decide an important question of federal law that has not been but should be settled by this Court. Pet., pp. 9-12.

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[1] Respondent also seems to suggest (p. 6, n. 3) that the parties stipulated to "a prior pattern of discrimination" *by Black Jack.* On the contrary, the stipulation (Pet. App. A-13, par. 30) related to the facts recited in the District Court's findings 25-29 (*id.* pp. 11-13) relating to the entire St. Louis metropolitan area, and to a period prior to the incorporation of petitioner and the passage of its zoning ordinance. There is no finding, and no basis in the record for a finding, of any prior pattern of discrimination by petitioner.

2. The brief in opposition also asserts (pp. 6-7) that petitioner is in error in asserting (pp. 12-14) that the court below imposed a strict compelling-governmental-interest standard of review in testing the validity of the zoning ordinance. The court below was not in the least ambiguous; it said (Pet. App. A-32 n.4):

> "Even though this case is based on a federal statute, rather than on the Fourteenth Amendment, we believe that, once the United States established a prima facie case of racial discrimination, it became proper to apply the compelling governmental interest requirement of the equal protection cases."

The apparent conflict of that basis for decision with the decisions of this Court and of other courts of appeal noted in the petition (pp. 12-14, 16 n.9) cannot, therefore, be dismissed, as respondents would have it (p. 7) as "of merely academic interest."[2]

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[2] In addition, contrary to the suggestion of the brief in opposition (p. 7), the compelling interest test has *not* previously been applied in testing the validity of discrimination under Title VIII in United Farmworkers v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974), and Kennedy Park Homes Assn. v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010. In United Farmworkers, the court specifically pointed out that it did "not reach the question of whether the city officials' conduct . . . constituted a violation of the Fair Housing Act, 42 U.S.C. § 3601 et seq.," 493 F.2d at 811 n. 12; rather, the case was decided under the Fourteenth Amendment and it was in this context that the court addressed the compelling interest test. Likewise, the court's reference to the compelling interest test in Kennedy Park arose in the context of its discussion of the unconstitutionality of certain discrimination under the Fourteenth Amendment, 436 F.2d at 114; no reference was made to Title VIII in the court's discussion.

CONCLUSION

The decision below, as the petition states (p. 18) has departed from principles established by this Court, has reached a result which is contrary to that reached in other circuits, and has cast doubt on the validity of a vast array of local zoning ordinances. Its significance, and the need for its review—and reversal—by this Court should not be obscured by representing it as something it is not. Indeed, the effort of respondent to oppose its review on this ground serves only to underscore the need for its examination by this Court.

Respectfully submitted,

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